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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compelled self-incrimination may be properly invoked by a sole proprietor in response to a subpoena for preexisting business records, many of which were not prepared by him and are of a type kept by virtually all businesses.

2. Whether a person may properly resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the government's offer of the functional equivalent of use immunity with respect to the act of production.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-21a) is reported at 680 F.2d 327. The opinion of the district court (App. C, *infra*, 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1982. A petition for rehearing was denied on August 10, 1982. On October 1, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person *** shall be compelled in any criminal case to be a witness against himself ***.

STATEMENT

1. In the fall of 1980, a federal grand jury in Newark, New Jersey, was investigating corruption in the awarding of county and municipal contracts, as well as related tax violations. The investigation focused in part on the activities of respondent John Doe[1] and the several companies (organized as sole proprietorships) through which he did business with the units of local government.

In November and December 1980, the grand jury caused five subpoenas to be served on respondent calling for the production of numerous business records relating to his various companies (see App. D, *infra*, 28a-36a). The first two subpoenas demanded the production of the telephone toll records of several of his companies, as well as "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four bank accounts held by respondent or his companies (*id.* at 28a-31a).

The third subpoena required respondent to produce "any and all records as per the attached Schedule A for [one of

[1] Because of the ongoing grand jury inquiry, the court of appeals granted the government's request not to disclose respondent's name or any details that would identify him (see App. A, *infra*, 2a n.1). For this reason, we have not used respondent's name in this brief and have deleted his name and other potentially identifying details from the documents reproduced in the appendix.

respondent's companies] for the period January 1, 1976 to present" (*id.* at 32a-33a). Schedule A listed 28 categories of common business records (*id.* at 33a).[2]

The fourth subpoena demanded production of a similar list of business records belonging to another company (App. D, *infra*, 34a-35a). The final subpoena required respondent to testify and produce "all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts "at the Royal Bank of Canada, Georgetown, Grand Cayman Islands" belonging to two other companies (*id.* at 36a).

Respondent moved to quash all five subpoenas on Fifth Amendment grounds, and the district court granted his motion except with respect to those documents required to be kept by law (App. B, *infra*, 22a). In its opinion, the court seemingly accepted the government's argument that the documents' contents were themselves not privileged (see App. C, *infra*, 25a). The court wrote, however (*id.* at 25a-26a; emphasis in original):

> [T]he relevant inquiry is *** whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher* v. *United States*, 425 U.S. 391 (1976). ***
>
> * * * * *
>
> With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are

[2] These were:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid bonds and contracts.

> authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights.

The district court reached this conclusion even though the government had represented on the record that no subsequent use would be made of respondent's act of production and had suggested that respondent be given the "functional equivalent of use immunity" with respect to the act of production (C.A. App. 56a, 71a-72a, 75a-76a; Memorandum in Support of Motion for Reconsideration at 21-22).

2. The court of appeals affirmed (App. A, *infra*, 1a-21a). The court first rejected the government's argument that a sole proprietor, like the officer of a corporation or unincorporated association or a member of a partnership, should not be permitted to assert the Fifth Amendment privilege when served with a subpoena for the records of his business or organization. The court so held despite its recognition that "the Government's position has considerable analytic appeal" (*id.* at 6a), since permitting a sole proprietor to assert the Fifth Amendment privilege "'only because of the form of business organization'" he has chosen results in "'an irrational hole in the constitutional system of regulation of crime detection'" (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980)).

The court next concluded that respondent was entitled to resist the subpoenas at issue here on Fifth Amendment grounds. The court stated flatly that "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (App. A, *infra*, 14a). The court began by noting the rule announced in *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), that the Fifth Amendment protects an individual against the compelled production of his private papers (App. A, *infra*, 8a). The court acknowledged that *Fisher* v. *United States*, 425 U.S. 391 (1976), had "seemingly diverged from" that rule by concluding that "the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, 'applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*'" (App. A,

infra, 9a, quoting *Fisher*, *supra*, 425 U.S. at 408). The court of appeals nevertheless asserted (App. A, *infra*, 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

The court of appeals also concluded that respondent was entitled to invoke the Fifth Amendment privilege because, in its view, the act of producing the documents amounted to a potentially incriminating communication (App. A, *infra*, 14a-17a). The court distinguished *Fisher*, where a similar argument was rejected, on the ground that there "'[t]he existence and location of the papers [was] a foregone conclusion'" (*id.* at 15a, quoting *Fisher*, *supra*, 425 U.S. at 410), whereas in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (App. A, *infra*, 15a; emphasis added).

The court added that enforcement of the subpoenas would require respondent to authenticate the documents sought (App. A, *infra*, 16a). Observing that "many (although certainly not all) of the subpoenaed records *** most likely were prepared by the appellee," the court stated (*ibid.*) that "[t]he record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation."

The court next held (App. A, *infra*, 18a-19a) that respondent was entitled to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all the documents sought by the subpoenas, including those that respondent had not prepared. The court relied (*id.* at 18a & n.17) upon the government's statement that the contents of the documents sought might tend to incriminate respondent.

Finally, the court held that respondent could assert the Fifth Amendment privilege despite the government's representation that the act of producing the documents would not be used against him and despite the government's

request that he be afforded the functional equivalent of use immunity with respect to the act of production (App. A, *infra*, 19a-20a).[3]

REASONS FOR GRANTING THE PETITION

This case presents important, unsettled, and frequently recurring questions concerning the scope of the Fifth Amendment privilege against compelled self-incrimination when preexisting business records of a sole proprietorship are sought by subpoena or equivalent process.

Documentary subpoenas or summonses for business records are an indispensable tool in investigations of sophisticated criminal activity, including drug offenses, racketeering, and official corruption, as well as in the enforcement of the tax laws. This Court has decided in a variety of contexts that most types of business-related documents may be obtained by subpoena or summons despite the assertion of the Fifth Amendment privilege by the custodian of the records. Thus, it is now settled that the Fifth Amendment privilege may not properly be asserted when the records of a corporation (*Dreier* v. *United States*, 221 U.S. 394 (1911); *Wilson* v. *United States*, 221 U.S. 361 (1911)), partnership (*Bellis* v. *United States*, 417 U.S. 85 (1974)), or labor union (*United States* v. *White*, 322 U.S. 694 (1944)), are sought, but this Court's decisions leave unclear the status of the records of sole proprietorships, and the courts of appeals are divided on this important issue. Following the reasoning in *Fisher* v. *United States*, *supra*, at least one court of appeals has held that the Fifth Amendment does not protect the contents of any preexisting business records (see page 10, *infra*). However, other courts of appeals (see

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[3] Following the quashing of the subpoenas at issue here, respondent was indicted and convicted of various charges stemming from the grand jury investigation. Execution of sentence was suspended, and respondent was placed on probation and fined. However, the grand jury investigation is continuing, production of the requested documents is still needed, and there remains the possibility that the contents of the documents would incriminate respondent as to offenses other than those for which he has already been convicted. Accordingly, the case is not moot.

pages 9-10, *infra*), including the court below (App. A, *infra*, 14a), have held that the contents of an individual's business records are privileged. These courts note that this question was not specifically decided in *Fisher*, where the records in question did not belong to and had not been created by the persons asserting the privilege. Instead of *Fisher*, these courts look to the rule—announced in *Boyd* v. *United States*, *supra*, and discredited in *Fisher* (425 U.S. at 404-409)—that the Fifth Amendment prohibits the compulsory production of private papers.

Sole proprietorships are the most common form of business organization in this country, and subpoenas and summonses for the records of such enterprises are a daily occurrence. Thus, the present confusion concerning the applicability of the Fifth Amendment privilege to subpoenas for such records is in great need of resolution by this Court.

This Court should also resolve whether a sole proprietor or individual may resist compliance with a subpoena duces tecum or documentary summons on the ground that the act of production itself would be self-incriminating, a question left open by *Fisher* (see 425 U.S. at 410). And even if that question is answered favorably to the person invoking the privilege, the issue remains whether the availability of the privilege can somehow survive the government's offer of use immunity with respect to that act. While at least one court of appeals has held that the Fifth Amendment privilege may not properly be asserted in that situation (see page 19, *infra*), the court below affirmed the quashing of subpoenas even though the government had offered the functional equivalent of act of production immunity. Where the act of production is considered sufficiently testimonial and incriminating to sustain the claim of privilege, the efficacy of such immunity grants to secure production of the records is manifestly a matter of substantial importance.

1. The decision of the court of appeals poses an important question left unresolved by this Court's decision in *Fisher* v. *United States*, *supra*, i.e., whether the contents of an individual's business records are protected by the Fifth Amendment privilege. In *Fisher*, taxpayers under investi-

gation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents in question was written by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on grounds of attorney-client privilege because the Fifth Amendment would not have prevented disclosure of the documents if they had remained in the taxpayers' possession.

The Court began by disapproving the proposition, derived from *Boyd* v. *United States*, *supra*, that "the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate" (*Fisher*, *supra*, 425 U.S. at 405). The Court termed that proposition "a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him" (*id.* at 409) and further noted (*id.* at 408, 410-411) that that rule was inconsistent with decisions holding that the records of corporations, partnerships, and unincorporated associations could be obtained by subpoena despite a claim of Fifth Amendment privilege. The Court reasoned as follows (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court recognized (425 U.S. at 410) that it might in some circumstances be said that the act of producing the documents is the equivalent of incriminating testimony—either because it concedes "the existence of the papers demanded and their possession or control by the taxpayer" or

because it serves to authenticate them. However, the Court found that in that case the act of production would not involve testimonial self-incrimination (*id.* at 410-412).

Although nearly four pages of the Court's opinion had been spent disapproving *Boyd's* interpretation of the Fifth Amendment (425 U.S. at 405-409), the Court concluded with the following observation (*id.* at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S., at 634-635.

In sum, although *Fisher* refrained from expressly deciding the question presented by this case, the Court's reasoning extended far beyond its narrow holding. The courts of appeals have responded to *Fisher* in two ways. Some have followed *Fisher's* reasoning toward its logical conclusion, while others have confined *Fisher* to its facts and have "continued to recognize *Boyd's* protection-of-private-papers principle" (App. A, *infra*, 11a n.7) in all other situations. The results have been conflicting decisions by the courts of appeals and doctrinal incongruities termed irrational or illogical by the very courts that have adhered to them.

a. The courts of appeals are sharply divided concerning the issue whether the Fifth Amendment protects the contents of an individual's business records. As previously noted, the court below, expressing continued allegiance to *Boyd*, held (*id.* at 14a) "that an individual's business papers *** cannot be subpoenaed by a grand jury." The Fifth Circuit has taken a similar position. In *United States* v. *Davis*, 636 F.2d 1028, 1043, cert. denied, 454 U.S. 862 (1981), the court vacated portions of an order enforcing an IRS summons, stating a rule "that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in

content" (636 F.2d at 1043; footnotes omitted). The court stated (*id.* at 1042) that it refused to "limit the *Boyd* principle to non-business records or abolish it altogether." See also *United States* v. *Miller*, 660 F. 2d 563, 566-567 (5th Cir. 1981). Similarly, in *In re Grand Jury Subpoena (Kent Oil)*, 646 F.2d 963, 968 (5th Cir. 1981), the same court affirmed an order quashing a subpoena for a sole proprietorship's business records because "a sole proprietor's fifth amendment privilege against self-incrimination protects the 'non-required' records of the proprietorship from compelled production in response to a grand jury subpoena directed to the sole proprietor." While this Court had described *Boyd's* "prohibition against forcing the production of private papers" as a "rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him" (*Fisher*, *supra*, 425 U.S. at 409), the *Kent Oil* court stated (646 F.2d at 968; emphasis added): "[*I*]*t is settled* that the privilege reaches the compelled production of an individual's private books and papers in response to a subpoena or equivalent process, *Boyd* v. *United States*, 116 U.S. 616, 634-35 *** (1886)."[4]

By contrast, the First Circuit has held that the contents of a doctor's appointment books are not privileged because "[t]he line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection; such protection is afforded only to the testimonial content of the act of turning over the records under compulsion" (636 F.2d at 1055; footnote omitted). See also *United States* v. *Doe*, 628 F.2d 694 (1st Cir. 1980); *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980); *United States* v. *Bray*, 546 F.2d 851, 855 (10th Cir. 1976).

[4] In *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976), the court refused enforcement of the portion of an IRS summons requiring a taxpayer to turn over letters he had written to his accountant. The court stated (*id.* at 331) that "the Fifth Amendment protects against compulsory production of a paper written by an accused with respect to his own affairs." In *United States* v. *Plesons*, 560 F.2d 890, 891-892 (8th Cir.), cert. denied, 434 U.S. 966 (1977), the court concluded that a doctor's medical records, including appointment books, fell "within the historic area of protection afforded by the fifth amendment to private documents."

b. The same factors that produced the conflicting decisions noted above led the court in the instant case to draw a distinction—which the court itself described as "'irrational'" (App. A, *infra*, 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, *supra*, 626 F.2d at 1056)—between the protection afforded to the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other (see App. A, *infra*, 5a-8a). The court of appeals offered no principled defense of the distinction it drew; indeed, it stated (*id. at* 6a) that treating all business records in the same way had "considerable analytic appeal." However, the court felt compelled to reach the result it did because of dictum in *Bellis* v. *United States*, *supra*, 417 U.S. at 87-88 (see App. A, *infra*, 6a-8a). That dictum, in turn, was expressly based upon the *Boyd* rule.[5] On an earlier occasion, the same court of appeals wrote (*ICC* v. *Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980)): "[W]hile *Fisher*, *Andersen*, *Bellis*, and the cases cited therein may well presage a trend toward elimination of the fifth amendment privilege for all business records, *** such a final break with *Boyd* is not for us to make."

This Court should grant certiorari to consider whether there exists a justifiable basis for treating all corporate or partnership records differently from the records of all sole proprietorships. If, as the court below has suggested[6], one

[5] *Bellis* stated (417 U.S. at 87-88):

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635 ***. The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States*, *supra*, ***.

This interpretation of the Fifth Amendment privilege was disavowed in *Fisher* (425 U.S. at 405-409).

[6] See App. A, *infra*, 11a-12a; *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980).

of the principal purposes of the Fifth Amendment privilege is to preserve a zone of personal privacy, it appears anomalous to hold that a corporation or partnership, no matter how small or personal, enjoys no Fifth Amendment rights, while a sole proprietorship, no matter how large and impersonal, may be shielded from producing business records. On the other hand, if the Fifth Amendment privilege "protects a person only against being incriminated by his own compelled testimonial communications" (*Fisher, supra*, 425 U.S. at 409), there is similarly little if any basis for treating sole proprietorships differently from corporations and partnerships. When a subpoena is issued for preexisting business records, there is no more testimonial compulsion on the sole proprietor than there is on the corporate officer or partner. Similarly, the existence, possession, and control of certain common types of business records are no more at issue when they are subpoenaed from a sole proprietorship than when the subpoena is served upon a corporation or partnership. See *Fisher, supra*, 425 U.S. at 411-412.

The difference between a corporation and a sole proprietorships is often nothing more than a legal formality and does not reflect the size, structure, activities, or longevity of the business. In recent years, for example, thousands of physicians, lawyers, dentists, and other professionals have incorporated, principally for tax purposes. It would be anomalous indeed if the contents of the records maintained by such persons enjoyed no Fifth Amendment protection, while those of their colleagues who continued to practice as sole proprietors remained fully protected. Similarly, there is no reason why the decision to take on a partner should have such a profound effect for Fifth Amendment purposes.

c. A similar anomaly has developed with respect to the protection afforded to the contents of a sole proprietor's business records when seized, on the one hand, and when sought by subpoena or summons, on the other. [redacted] *Fisher's* application with respect to the seizure of documents was clarified in *Andresen* v. *Maryland*, 427 U.S. 463 (1976), which held that the seizure of business records and their introduction into evidence at trial does not violate the

Fifth Amendment. Rejecting the contention that the contents of such records are protected by the privilege, the Court stated succinctly (*id.* at 473):

> [P]etitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing.

The Court then explained (*ibid.*) that petitioner had neither turned over nor authenticated the records and thus had not been compelled to incriminate himself by performing either of those acts.

Andresen plainly stands for the proposition that the *contents* of preexisting business records are not privileged—as Justice Brennan expressly acknowledged in dissent (see 427 U.S. at 486). It would seem to follow, therefore, that such records may be obtained by subpoena or summons unless the act of production itself constitutes testimonial self-incrimination. Nevertheless, as previously noted, in the absence of specific direction to the contrary from this Court, several courts of appeals continue to hold that the contents of such records are privileged when requested by subpoena or summons. The same courts apply *Andresen* to seized documents and thus implicitly hold that the protection afforded to a sole proprietorship's business records differs depending upon the method by which they are sought or obtained.[7]

The Fifth Circuit recognized the absurdity of such results—while at the same time sanctioning them. Writing for the court, Judge Wisdom observed (*United States* v.

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[7] In *ICC* v. *Gould*, *supra*, 629 F.2d at 859, for instance, the Third Circuit concluded:

> [U]nder *Bellis* the fifth amendment may be asserted by a sole proprieter to shield the business records of his sole proprietorship ***. By contrast, the Supreme Court has held, in *Andresen* v. *Maryland*, 427 U.S. 463 *** (1976), that the fifth amendment affords no protection whatsoever against the search and seizure of business records.

See also *United States* v. *Davis*, *supra*, 636 F.2d at 1042; compare *United States* v. *Mannino*, 635 F.2d 110, 115-116 (2d Cir. 1980) (contents of seized notebook not privileged), with *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976) (contents of taxpayer's letters may not be obtained by IRS summons).

Davis, *supra*, 636 F.2d at 1042): "It is difficult to find a logical reason for applying the *Boyd* principle to subpoenaed documents and not documents taken in a search, as in *Andresen*." But after citing prior Fifth Circuit opinions, he concluded (*ibid.*): "However illogically, these cases by implication limit *Andresen* to documents taken in a search."

Not only is the different treatment given seized and subpenaed documents illogical, but it will have an untoward impact upon privacy. The likely effect of the disparate treatment will be to encourage the use of search warrants to obtain documents and discourage the use of subpoenas, even though the latter are plainly far less intrusive.

d. As noted, the court below and several other courts of appeals have sought to distinguish *Fisher*, where the papers in question were not written or owned by those asserting the privilege, from the much more common situation presented here. However, those distinctions are plainly invalid and have the effect of draining *Fisher* of much of its precedential significance.

The court below relied on two alleged factual differences between this case and *Fisher:* authorship and ownership of the records. *Fisher* leaves no doubt, however, that a person may not resist a subpoena or summons on Fifth Amendment grounds simply because he prepared, wrote, or owns the incriminating papers sought. The Court there stated (425 U.S. at 410; emphasis added): "The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, *whether his own* or that of someone else." The Court added (*id.* at 410 n.11): "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege."

Moreover, it is apparent that many of the documents sought by the subpoenas in this case—including telephone toll records, bank statements, and bank deposit tickets—were prepared by persons other than respondent. The court of appeals itself conceded (App. A, *infra*, 16a) that "certainly not all *** of the subpoenaed records *** were prepared by [respondent]."

As for ownership, while the *Fisher* Court assumed that the taxpayers did not have title to the accountants' workpapers, the taxpayers undoubtedly paid to have those papers prepared, and they readily obtained possession of the papers from their accountants after learning of the IRS investigation. Thus, if ownership of the papers was the determinative fact in *Fisher*, the result in that case would have been different if the taxpayers had purchased the papers from their accountants for nominal consideration or if the accountants had relinquished possession with donative intent. We do not believe that the decision in *Fisher* was based upon any such fine distinctions of state property law. As the Ninth Circuit stated in rejecting a similar interpretation of *Fisher* (*In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1028 (1976) (emphasis in original)):

> We read *Fisher* as resting on a broader principle. It permits compulsion by way of a summons or subpoena to produce documents when their *production* does not "ordinarily compel the taxpayer to restate, repeat or affirm the truth of the content of the documents sought." Mere ownership of an accountant's work papers does not convert the production of such papers into an affirmation of the truth of their contents.

The effect and clear intent of the court of appeals' decision is to make *Fisher* a very narrow exception to *Boyd's* "prohibition against forcing the production of private papers" (*Fisher*, *supra*, 425 U.S. at 409). In *Fisher*, this Court disapproved that rule (*ibid.*), but the court below candidly stated that it "continued to recognize *Boyd's* protection-of-private-papers principle" (App. A, *infra*, 11a n.7). Under its approach, the *Boyd* rule remains fully in effect, except presumably in cases involving the same peculiar factual situation as *Fisher*, i.e., where the papers sought were not written or prepared and are not owned by the person upon whom the subpoena is served. That situation will naturally arise infrequently and can be easily avoided simply by transferring title to the documents. In our view, if *Fisher* is to be restricted in this fashion and *Boyd* is to be resuscitated, that task should be performed by this Court rather than the lower federal courts.

e. *Fisher* is also undermined by the portion of the court of appeals' decision holding that the act of producing any of the documents sought by the subpoenas in this case would amount to incriminating testimonial communication. *Fisher* acknowledged (425 U.S. at 410-411) that the act of producing documents might be considered testimonial, first, if it "tacitly concedes the existence of the papers demanded and their possession or control" by the person upon whom the subpoena or summons is served and, second, if the documents are thereby authenticated. However, *Fisher* makes it clear that under circumstances such as those in the present case the act of producing at least some of the documents demanded by the subpoenas would not constitute testimonial self-incrimination.

Here, as in *Fisher*, "[i]t is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment" (425 U.S. at 411). After noting (*ibid.*) that the papers in *Fisher* were "the kind usually prepared by an accountant working on the tax returns of his client," the Court concluded:

> Surely the Government is in no way relying on the "truthtelling" of the taxpayer to prove the existence of or his access to the documents. *** The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.

This reasoning applies equally to many of the documents sought by the subpoenas in this case, such as general ledgers, vouchers, paid bills, invoices, and telephone toll records. Such documents are kept by virtually every business, from the smallest family concern to the largest conglomerate, and therefore conceding their existence, possession, and control "adds little or nothing to the sum total of the Government's information" (425 U.S. at 411)

The court of appeals attempted to distinguish *Fisher* on the ground that in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (App. A, *infra*, 15a; emphasis

added). However, the government seldom if ever knows as a certainty that subpoenaed documents exist and are subject to a witness's control. Even if the government has incontrovertible evidence that the witness had possession and control of the documents in the very recent past, the possibility will always exist that the documents were subsequently moved or destroyed. Accordingly, the decision below limits *Fisher* to an extremely narrow, if not virtually nonexistent, class of cases.

The court of appeals also contended that enforcement of the subpoenas in this case would require respondent to authenticate the documents sought, whereas in *Fisher* the taxpayers could not have authenticated the accountants' workpapers. The court of appeals wrote (App. A, *infra*, 16a): "Here *** many (although certainly not all) of the subpoenaed records *** most likely were prepared by [respondent]." But if respondent did not prepare and could not authenticate all the documents sought, why were the subpoenas quashed in their entirety? Moreover, the government represented that it would not rely upon respondent for authentication of the documents and proposed several workable methods of implementing that promise—e.g., respondent's attorneys could hand over the documents or respondent could be immunized with respect to the act of production (see page 18, *infra*).

The court of appeals observed in this connection (App. A, *infra*, 16a) that "[t]he record contains no explanation by the United States as to how documents [prepared by respondent] could be authenticated without [respondent's] explicit or implicit participation." This is odd reasoning indeed: respondent may resist production of the documents on grounds of self-incrimination because the government may be unable to use those documents against him at any subsequent trial. Obviously the government could not tell specifically how, or if, many of the documents could be authenticated until they were turned over, but as the court of appeals must have recognized, many possible alternative methods of authentication are apparent.[8]

[8] For example, a letter written by respondent could be authenticated by a handwriting expert, by any other person familiar with his handwriting, or by the trier of fact if furnished with a specimen of re-

2. Finally, this Court should grant certiorari to resolve whether a witness may resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the government's binding assurance that no use would be made of the act of production. In this case, the government agreed not to use respondent's act of production against him in any way (see C.A. App. 55a-56a, 106a-108a; Memorandum in Support of Motion for Reconsideration at 22), and the government offered several suggestions for implementing that proposal. The government suggested that respondent turn over the documents to a third party, such as the district court or his own attorney (see C.A. App. 56a, 71a-72a, 75a-76a; see also *United States* v. *Doe*, 628 F.2d 694, 696 (1st Cir. 1980). The government also suggested that the court could grant respondent "the functional equivalent of use immunity" with respect to the act of production (Memorandum in Support of Motion for Reconsideration at 22).[9]

The court of appeals held that the government's agreement not to use respondent's act of production against him provided no basis for overcoming his Fifth Amendment privilege because a formal request for statutory immunity had not been made (App A, *infra*, 19a).[10] However, the court's reasoning was clearly unsound. The court suggested that a judicial grant of use immunity with respect to the act or production would "'intrude into an area which should be more appropriately left to prosecutorial discretion'" (*id.* at

spondent's handwriting as a basis for comparison. Fed. R. Evid. 901(b)(2) and (3). A general ledger prepared by respondent could be authenticated by an employee who saw respondent prepare it or regularly used the ledger as part of his work. Fed. R. Evid. 901(b)(1).

[9] The government did not make a formal request that respondent be granted statutory immunity (see 18 U.S.C. 6001-6003) because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all documents listed in the subpoenas rather than showing that the act of producing particular documents or categories of documents would amount to testimonial self-incrimination.

[10] Ironically, the Third Circuit has held that in some circumstances a district court may immunize defense witnesses without the government's consent. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980).

20a, quoting *In re Grand Jury Matter*, 673 F.2d 688, 695-696 (3d Cir. 1982) (concurring opinion), petition for cert. pending, No. 82-183. We agree that the prerogatives of the executive branch would be improperly abridged if a court conferred testimonial immunity without the government's consent but we fail to see how prosecutorial discretion can be abridged if the prosecution's own immunity request is granted.

Since the documents sought by the subpoenas in this case were created voluntarily and not as the result of government compulsion, it must follow that conferring use immunity with respect to the act of production removed any possible basis for resisting the subpoenas on Fifth Amendment grounds. See *United States* v. *Doe*, 628 F.2d 694 (1st Cir. 1980) (statutory immunity with respect to act of production); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051 (1st Cir. 1980) (statutory immunity); *United States* v. *Davis*, *supra*, 636 F.2d at 1041 (footnote omitted) (suggesting that "it should not be a ground for refusing to produce the documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial"); *United States* v. *Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979). The decision below, which affirmed the quashing of subpoenas on Fifth Amendment grounds despite an offer of such immunity, was accordingly in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1782

IN THE MATTER OF:
GRAND JURY EMPANELLED MARCH 19, 1980
UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-0053

Argued February 17, 1982
Before: ADAMS AND SLOVITER, *Circuit Judges*,
AND VANARTSDALEN, *District Judge**

(Filed June 10, 1982)

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

The United States appeals from a district court order quashing, subject to a limited exception, a number of grand jury subpoenas duces tecum. The widesweeping subpoenas,

* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

if enforced, would require a sole proprietor, who is a target of the grand jury's investigation, to produce a host of records allegedly pertaining to his business and in his possession and control. Aside from those records required to be kept by law, the district judge, citing the protection against self-incrimination afforded by the fifth amendment, declined to direct that the requested documents be made available to the grand jury. We affirm.

I

This appeal arises out of an investigation by a federal grand jury in New Jersey into corruption relating to the awarding of county and municipal contracts. A portion of the investigation focused on the appellee,[1] who, according to the United States, operated as a sole proprietor several companies that did business with various units of local government. In November and December 1980, the appellee received five separate subpoenas duces tecum, which commanded him to appear before the grand jury and produce certain documents. Specifically, the appellee was directed to provide the jurors with numerous records relating to two of appellee's companies, including ledgers, journals, workpapers, vouchers, bank statements, contracts, corporate

[1] At oral argument, it was requested that because of the ongoing nature of the grand jury inquiry, the Court not disclose either the name of the appellee or any identifying details relating to the investigation. Hence, throughout this opinion, the person against whom the grand jury subpoenas were directed will be referred to as "the appellee."

minutes, etc.,[2] "all records, including but not limited to bank statements, cancelled checks, check stubs and deposit tickets" connected with specified bank accounts of the

[2] For example, the grand jury subpoena of December 19, 1980, directed "[a]ny authorized Officer or Representative" of one of the appellee's companies to "testify before the Grand Jury and bring with you any and all books, records and documents as per the attached Schedule A for the period January 1, 1976 to present." The items requested under Schedule A of the subpoena are:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book.
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid bonds and contracts.

appellee or his companies; and the telephone toll records of certain businesses. The appellee moved to quash the subpoenas on fifth amendment grounds.

The district judge conducted two hearings before ruling on the appellee's motion. Counsel for the United States conceded, for purposes of the argument, that "all the corporations described in the subpenas are sole proprietorships," and that the subpoenaed records "are in [the appellee's] hands." Additionally, the Government admitted that the documents it sought to obtain "will or may incriminate" the appellee. *See* note 17 *infra*.

In an opinion and order dated February 4, 1981, the district court granted substantially all the relief sought by the appellee. The court reasoned that, "[a]lthough the Fifth Amendment does not protect the records of corporations, unincorporated associations or partnerships, a sole proprietor can invoke the privilege to his benefit." The court then determined that the fifth amendment right of the appellee would be infringed were he forced to turn over the various subpoenaed documents, inasmuch as the appellee thereby would be compelled to make an incriminating testimonial communication. In this connection, the district judge observed that "the [mere] *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection.... [E]nforcement of the subpoenas would compel [the appellee] to admit that the records exist, that they are in his possession, and that they are authentic." The court accordingly granted the appellee's motion to quash, except as the motion related to those subpoenaed items, such as tax returns and W-2 statements, that are required by law to be kept or to be disclosed to a public agency.

After its motion for reconsideration was denied, the United States filed a timely appeal. We have jurisdiction under 18 U.S.C. § 3731, which has been held to authorize an appeal by the Government from a district court order quashing a grand jury subpoena duces tecum. *See In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 854-58 (3d Cir. 1979).

II

We proceed to analyze the scope of protection under the fifth amendment available to a sole proprietor whose records and papers have been subpoenaed by a grand jury. Our inquiry in this regard is fourfold: (A) Can the fifth amendment privilege be invoked by a sole proprietor in response to a subpoena for his business-related records? (B) If so, under the particular circumstances of this case, would compelled production of the subpoenaed documents amount to an incriminating testimonial communication, thereby entitling the appellee to take refuge in the protection afforded by the amendment? (C) Did, as the United States contends, the appellee fail to qualify for that protection by proffering an overly-broad motion to quash? (D) And, even if the appellee prevails with respect to the previous questions, can the Government nonetheless compel production of the requested records by suggesting that the act of their surrender be "immunized"?

A

As has often been noted, the constitutional privilege against self-incrimination is "essentially *a personal* one, applying only to natural individuals," *United States v. White*, 322 U.S. 694, 698 (1944) (emphasis added). The privilege, consequently, cannot be asserted by a collective group, such as a corporation or a union, or by a representative, employee, or agent of a collective group. Employing this principle, the Supreme Court has refused to recognize a claim of fifth amendment protection with respect to individually held records of corporations. *Wilson v. United States*, 221 U.S. 361 (1911); labor unions, *United States v. White, supra:* organizations. *McPhaul v. United States*, 364 U.S. 372 (1960); political parties, *Rogers v. United States*. 340 U.S 367 (1951); and partnerships, *Bellis v. United States*. 417 U.S. 85 (1974). "[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally," *Bellis, supra*. 417 U.S. at 88.

From this, the United States urges that the appellee should be obligated to turn over the documents requested here, however incriminating, for the same reasons that an individual in possession of corporate or partnership records is required to comply with a grand jury subpoena. The Government maintains that "it would be anomalous to hold that a corporation or partnership, no matter how small or personal, enjoys no fifth amendment rights, while a sole proprietorship, no matter how large and impersonal, is shielded from producing business records." Brief for Appellant at 13.

Although the Government's position has considerable analytic appeal,[3] it is clear that, under the present state of the law, the fifth amendment may be invoked by a sole proprietor regardless of the magnitude of his business. In *Bellis*, *supra*, the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the *size* of the organization the records of which were being subpoenaed, but rather the *nature* of the capacity—either personal or representational—with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations which have 'a recognizable juridical existence apart from [their] members,'" such as corporations or partnerships, and "those which do not," such as sole proprietorships. *In re Grand Jury Empanelled (Colucci)*, *supra*, 597 F.2d at 859 (quoting *In re Grand Jury Investigation*, 483 F.2d 961, 962 (3d Cir. 1973), *aff'd*,

[3] As the Court of Appeals for the First Circuit recently observed, if "[o]nly the personal self-created business records in the possession of a sole proprietor or practitioner . . . enjoy a privilege against subpoena," and "only because of the form of business organization chosen by their creator," such a rule would create "an irrational hole in the constitutional system of regulation of crime detection and would provide the individual with a remedy far exceeding the scope of his constitutional privilege." *In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1056 (1st Cir. 1980). The court proceeded to recommend that prosecutors make use of various immunity statutes, in order to "[h]armoniz[e] the government's right of lawful access to the contents of personal business records with the possessor's right not to have the testimonial implications of his submission used against him." *Id.*; *see* Part II (D) of this opinion, *infra*.

Bellis, supra). While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony ... *The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added).

In a straightforward application of *Bellis*, this Court rejected a previous effort on the part of the United States to construe the fifth amendment so as to distinguish between, for example, a small, family-operated sole proprietorship, and a large, corporate-like solely owned entity. Judge Garth, writing for the Court, noted that the decisional law clearly did not support such a distinction:

> An individual who holds records in a representative capacity for a collective entity (e.g. a corporation, union or partnership) may not assert a Fifth Amendment privilege when he is compelled to produce those records. On the other hand, a sole proprietorship has no legal existence apart from its owner, and such records *may* be protected from disclosure by the Fifth Amendment.

In re Grand Jury Empanelled (Colucci), supra. 597 F.2d at 859. *See also In re Grand Jury Subpoena (Kent).* 646 F.2d 963, 968 (5th Cir. 1981) ("[t]he fifth amendment protection applicable to a sole proprietor's business records is the same as the protection applicable to the records of an individual").

As the United States concedes, the appellee operates a number of sole proprietorships. Following *Bellis* and *In re Grand Jury Empanelled (Colucci)*, therefore, we conclude that the case law dealing with documents held by representatives of a collective group does not defeat the appel-

lee's claim of privilege under the fifth amendment. 597 F.2d at 859. Accordingly, we proceed to consider whether that claim should be honored, in view of the particular circumstances of this case.

B

Before *Fisher v. United States*, 425 U.S. 391 (1976), the prevailing rule was that "the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony," *Bellis, supra*, 417 U.S. at 87. This principle, which had its genesis in the English tradition,[4] was endowed with constitutional status nearly a century ago, when the Supreme Court held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" violated the fifth amendment. *Boyd v. United States*, 116 U.S. 616, 630 (1886). "Papers are [the owner's] ... dearest property," the Court reasoned; forcing their production "would be subversive of all the comforts of society," *Id.* at 627-28.

Prior to *Fisher*, an unbroken line of cases repeated the axiom that an individual's private papers were protected from compelled disclosure by the fifth amendment. *See Fisher, supra*, 425 U.S. at 419-20 (Brennan, J., concurring in the judgment) (citing cases). Among the more prevalent rationales for this principle was the notion that "the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination," and that personal privacy, properly understood, extended to the private written word as well as to the private unspoken thought; after all, under a contrary rule, "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those

[4] *See* the cases and authorities cited by Judge Hunter in *In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1043-44 (3d Cir. 1980).

memories would become the subjects of criminal sanctions however invalidly imposed." *Id.* at 416, 420 (Brennan, J., concurring in the judgment).

In *Fisher*, the majority seemingly diverged from these precedents. Justice White, writing for himself and five other Justices, noted that "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time," asserted that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers" had been repeated in subsequent decisions as mere "dictum," and concluded that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." 425 U.S. at 407-09. By focusing on the precise words of the amendment—*viz*, that "[n]o person ... shall be *compelled* in any criminal case to be a *witness against himself*," *id.* at 396 (emphasis by the Court)—the Justices arrived at a three-factor restatement of the applicability of the privilege against self-incrimination: the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, "applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*," *id.* at 408. In effect, the focus of the Court had shifted from privacy to the process of compulsion. *See* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath* of Fisher v. United States, 95 Harv. L. Rev. 683, 683 (1982).

Applying the new test to the facts of the *Fisher* case, the Court concluded that requiring a defendant-taxpayer to produce an accountant's workpapers in the taxpayer's possession[5] would not violate the fifth amendment, regardless

[5] Actually, the workpapers were not in the taxpayer's possession, but rather in the hands of his attorney, to whom the subpoena had been directed. The Court considered the status of the records in the taxpayer's hands, however, inasmuch as "[s]ince [the] taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance ... the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege." 425 U.S. at 405.

of how incriminating those papers might be to the taxpayer, because "the privilege protects a person only against being incriminated by his own compelled testimonial communications.," 425 U.S. at 409. In *Fisher*, the accountant's workpapers did not belong to the taxpayer, were not prepared by him, and contained no testimonial declaration by him; for that matter, inasmuch as their preparation was "wholly voluntary," the records "cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." *Id.* at 409-10.

The Court in *Fisher* recognized, however, that there were two situations where "[t]he act of producing evidence in response to a subpoena" could be said to have "communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. at 410-13. First, the act of producing documents in some instances might amount to an admission of the existence of such documents and their possession or control by the taxpayer. Second, the act of production might resemble the act of testimonial self-incrimination if responding to a subpoena would in some sense "authenticate" the documents produced. *See United States v. Beattie*, 522 F.2d 267, 270 (2d Cir. 1975) (Friendly, J.) ("[a] subpoena demanding that an accused produce his own records is ... the equivalent of requiring him to take the stand and admit their genuineness"). Because neither of these situations was present in *Fisher*,[6] however, the Court reiterated its conclusion that the fifth amendment

[6] In *Fisher*, there was no fear that compliance with the subpoena might provide the Government with the taxpayer's useful admission that he was aware and in possession of the requested documents. The Government knew that the accountant's workpapers existed and knew where they were located; therefore, the question was not one "of testimony but of surrender." Moreover, inasmuch as it is not illegal to seek accounting advice, the taxpayer's mere possession of these papers did not of its own accord pose "any realistic threat of incrimination to the taxpayer." 425 U.S. at 411-12. The problem of implicit authentication also was not present in *Fisher*: because the taxpayer, under the relevant rule of evidence, was not competent to authenticate the accountant's workpapers, his mere production of those papers "express[es] nothing more than the taxpayer's belief that the papers are those described in the subpoena." 425 U.S. at 413.

did not prevent the Government from obtaining, through subpoena, an accountant's workpapers in the possession of a taxpayer or his attorney.[7]

Fortified with this precedential perspective, we turn to a consideration of the dispute at bar. There can be little doubt that, had the grand jury subpoenas at issue here been directed to the appellee's *personal* papers, his assertion of the fifth amendment would be in order. To be sure, the Supreme Court in *Fisher* explicitly left open the *Boyd* question, *viz*, "[w]hether the Fifth Amendment would shield the taxpayer from producing *his own* tax records [as opposed to an accountant's workpapers] in his possession." 425 U.S. at 414 (emphasis added). But this Court, in accord with the Second Circuit,[8] already has concluded that

[7] In the aftermath of *Fisher* and Andresen v. Maryland, 427 U.S. 463 (1976) (holding that the seizure of papers, either public or private, pursuant to a valid search warrant, does not violate the fifth amendment, inasmuch as their possessor was not compelled "to aid in the discovery, production, or authentication of incriminating evidence," *id.* at 474), a number of commentators assumed that the Court had sounded the death-knell for the *Boyd* private-papers rule. *See, e.g.*, C. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts 279-80 (1980) ("By ahering to a narrow concept of what constitutes compulsion, instead of to the policies underlying the right, the Supreme Court has stripped the protection of the privilege from books and papers, the written counterpart of the "inviolable human personality'"); Gerstein. *The Demise* of Boyd: *Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343 (1979); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945 (1977). In fact, however, as discussed in the text *infra*, the Court declined to decide the "private papers" issue of *Boyd*. Moreover, lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle. *See In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1044 n. 23 (3d Cir. 1980) ("Although some commentators have predicted the demise of this fifth amendment right, ... we explicitly reject this prophecy"); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fishery*, United States, 95 Harv. L. Rev. 683, 692-94 (1982).

[8] *See In re* Grand Jury Subpoena Duces Tecum (April 23, 1981), 657 F.2d 5, 8 n.1 (2d Cir. 1981), *decision on remand*. 522 F. Supp. 977, 979 (S.D.N.Y. 1981); United States v. Beattie, 541 F.2d 329, 331 (2nd Cir. 1976).

the fifth amendment privilege applies, even after *Fisher*, to an individual's production of his private papers in response to a subpoena. In *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980), relying primarily on *Boyd* and its progeny, we concluded—or, more accurately, reaffirmed our conclusion in light of *Fisher*—that one of the purposes of the fifth amendment was to ensure an individual's right "to a private enclave where he may lead a private life" (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964)).[9] Noting that no case as of yet had held that the fifth amendment did not protect an individual's personal papers from compelled production, Judge Hunter observed that the "failure to continue to preserve this right, which we believe basic, would be a step backward in what has been a long and bitterly contested battle to accord rights to persons who stand accused of crime." 632 F.2d at 1044 & n. 23. Accordingly, the Court declined to enforce a subpoena that sought to obtain an individual's private pocket diaries. *In re Grand Jury Proceedings (Johanson)*, then, at least until overruled by an in banc Court, forecloses consideration of whether the appellee's private papers are subject to subpoena by a grand jury.

It would appear from the face of the subpoenas that nearly all of the apellee's records demanded by the Government are of a business, as opposed to a personal, nature, although the district court has made no finding on this score. The United States argues that, whatever the protection afforded by the courts to personal documents, the business records of a sole proprietorship should not be immune from compelled production for purposes of a criminal investigation. The Government stresses that no showing has been made that any of the documents subpoenaed here were prepared by the appellee, and contends that the items requested are of the type obtained, pursuant to subpoena,

[9] *But see* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 7, at 629-94 (criticizing *In re Grand Jury Proceedings (Johanson)* as "inconsistent with *Fisher*," inasmuch as "the change in fifth amendment jurisprudence seems to leave no room for an exception based on a privacy rationale").

from corporations and partnerships. *See United States v. Osborn*, 561 F.2d 1334, 1338-39 (9th Cir. 1977) (holding that the compelled production of certain of an individual's business documents "involves no testimonial self-incrimination").

Our recent decision in *ICC v. Gould*, 629 F.2d 847 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981), however, would appear to blunt this angle of attack, at least in this Circuit. Although *Gould* is not strictly analogous,[10] the Court there squarely considered the applicability of the fifth amendment privilege with respect to the business records of a sole proprietor. Judge Garth, speaking for the Court, began by quoting *Bellis* to the effect that "[t]he privilege applies to the business records of the sole proprietor or sole practitioner as well as to [his] personal documents." 629 F.2d at 858 (quoting *Bellis*, *supra*, 417 U.S. at 87-88). While recognizing that this "sweeping" *Bellis*-derived-from-*Boyd* rule may have been undercut by *Fisher*, the opinion nonetheless concluded that the rule still was good law:

> [W]here the records are not those of a collective entity, and are not held in a representative capacity, but are rather records of an individual proprietorship not separate or distinct from the sole proprietor, ... neither *Bellis* nor any case to date holds that such records are without the individual proprietor's fifth amendment privilege.

629 F.2d at 859 (footnote omitted). The Court took pains to note that "Fisher, ... Bellis, and the cases cited therein may well presage a trend toward elimination of the fifth amendment privilege for all business records, even when the proprietor is required to produce and thus implicitly authenticate them." Nevertheless, *Gould* declared, "such a final break with *Boyd* is not for us to make. *As we read the*

[10] *Gould* involved the validity of administrative investigatory procedures. Nonetheless, in that part of the opinion with which we are concerned, the Court assumed that the ICC could proceed only to the extent permitted by the fifth amendment. It was necessary, therefore, for the Court to consider the protection afforded by that amendment to a sole proprietor's business records.

Supreme Court's most recent pronouncements, the fifth amendment still affords [a sole proprietor] . . . the same protection for [the proprietorship's] business papers as he claims for his own personal papers." Id. at 859 n.22 (emphasis added). *See also In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 968 (5th Cir. 1981); *In re Oswalt*, 607 F.2d 645, 647-48 (5th Cir. 1979). *Gould*, then, stands for the proposition that an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury.[11]

Furthermore, even if *Johanson* and *Gould* were construed more narrowly than we have read them, compelling the appellee, under the circumstances of this case, to respond to the grand jury's subpoenas would bring about an impermissible incriminating "testimonial communication," as that concept is defined and employed in *Fisher*. To be sure, the documents requested here, like those sought in *Fisher*, were voluntarily prepared, and therefore "cannot be said to contain compelled testimonial evidence" in and of themselves. *See Fisher*, *supra*, 425 U.S. at 409-10. But the Supreme Court in *Fisher* went to great lengths to demonstrate that, in certain situations, the very act of producing subpoenaed records might amount to an incriminating declaration. *See id.* at 410-13; *see also id.* at 430-34 (Marshall, J., concurring in the judgment). And such a situation, we believe, is present in the dispute at bar.

In *Fisher*, the Supreme Court stressed that the accountant's workpapers in the taxpayer's possession did not be-

[11] We recognize that language in *In re* Grand Jury Empanelled (Colucci), 597 F.2d 851, 862 (3d Cir. 1979)—which, it should be realized, predated *Gould*—can be read to limit the availability of the fifth amendment privilege with respect to business records. The *holding* in that case, however—that the business records of a sole proprietor *in the possession of another person* can be subpoenaed by a grand jury—is entirely consistent with the result we reach today. The documents sought by the grand jury here, unlike those demanded in *Colucci*, are in the possession of the appellee; and, clearly, "[i]t is the holder of the papers, rather than the owner, who is subjected to governmental compulsion by a *subpoena duces tecum*, and therefore only the holder of the papers may assert that the *subpoena* violates his right under the Fifth Amendment." 597 F.2d at 862.

long to the taxpayer, were not prepared by him, and did not contain his testimonial declaration. Obviously, such cannot be said about the documents in the present controversy, inasmuch as the papers the appellee seeks to protect belong to him and in all likelihood contain (possibly incriminating) declarations by him. More to the point, however, is the district court's observation that forcing the appellee to produce this papers under the circumstances present here would give rise to "communicative aspects of its own" (quoting *Fisher*, 423 U.S. at 410). The mere act of producing the documents may be considered a communication having testimonial significance as "an admission that the subpoenaed records exist" (quoting *In re Grand Jury Empanelled (Colucci)*, *supra*, 597 F.2d at 861), or as a "belief that the papers are those described in the subpoena" (quoting *Fisher*, 425 U.S. at 410). In *Fisher*, "[t]he existence and location of the papers [was] a foregone conclusion and the taxpayer add[ed] little or nothing to the sum total of the Government's information by conceding that he in fact ha[d] the papers." 425 U.S. at 411; *see also United States v. Praetorius*, 622 F.2d 1054, 1062-63 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980) (ordering production of document because its existence and location were known by the Government). In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist—or that the appellee even is somehow connected to the business entities under investigation[12]—is attempting to compensate for its lack of knowl-

[12] At oral argument, counsel for the appellee asserted that the Government hitherto has been unable to establish a connection between the appellee and the businesses with respect to which documents were sought by the grand jury. To the extent, then, that ordering the appellee to comply with the subpoenas would furnish the United States with a "missing link" in its evidentiary chain—*i.e.*, information that the appellee in fact operates the businesses and holds the bank accounts under review—a further incriminating testimonial communication would arise.

edge by requiring the appellee to become, in effect, the primary information against himself. *See* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra*, at 685 n.23 ("a subpoena duces tecum is the only alternative when authorities are unsure of the existence or the location of evidence"). As we read *Fisher*, however, this the fifth amendment does not permit the Government to do.

Moreover, disclosure would contravene the concern evidenced in *Fisher* that persons not be compelled to authenticate self-incriminating documents. In *Fisher*, the Court noted that the accountant's workpapers could be authenticated only by the accountant; thus, "[t]he documents would not be admissible in evidence against the taxpayer without authenticating testimony" in any event, *Fisher*, 425 U.S. at 413. Here, however, many (although certainly not all) of the subpoenaed records—such as, for example, the ledgers, journals, contracts, correspondence, and memoranda—most likely were prepared by the appellee. The record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation.[13] As the district court observed in this connection,

> the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial, if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [the appellee's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect [the appellee] in subsequent proceedings.

[13] *See In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1055 (1st Cir. 1980) ("In many cases . . . the authentication of the document, which may be proven by an official's testimony that he received them from the individual who prepared and possessed them, will provide a necessary link to incriminating evidence contained in the documents"); United States v. Plesons, 560 F.2d 890, 892-3 (8th Cir. 1977) (incriminating documents that could have been protected, had fifth amendment privilege properly been asserted, were introduced at trial and identified as records seized from the defendant).

Appendix at 98 (footnote omitted). Under these circumstances, we are unable to say, as did the Court in *Fisher*, that responding to the subpoenas "would not appear to represent a substantial threat of self-incrimination." 425 U.S. at 413.

Accordingly, we hold, therefore, that enforcement of these subpoenas would result in a compelled testimonial communication, an outcome neither compatible with the fifth amendment nor consonant with *Fisher*.[14] Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials. For example, many of the records sought from the appellee in this case no doubt could be obtained by the Government from other sources. Similarly, the appellee would have no right to invoke the fifth amendment if the documents involved were not in his actual or constructive possessi n. *Couch v. United States*, 409 U.S. 322 (1973). Nor could he complain if the documents had been prepared by or obtained from a third party, *Fisher*, or if they were seized from his office by investigators bearing valid warrants, *Andresen v. Maryland*, 427 U.S. 463 (1976). In this case, however, the Government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely this sort of expedition that the fifth amendment traditionally has been interpreted to prevent.[15]

[14] *In re* Grand Jury Empanelled (Markowitz), 603 F.2d 469 (3d Cir. 1979), relied upon by the United States, is not to the contrary. That case, following and applying the rule of *Fisher*, found no testimonial communication where an individual was compelled to turn over potentially incriminating business documents which he allegedly held in his capacity as an attorney for certain clients. *id.* at 477. The situation in *Markowitz*, therefore, bears more resemblance to those in *Bellis* (where partnership records were deemed to be held in a representational capacity) and in *Fisher* (where the taxpayer attempted to protect records that he had not prepared and of which he had not retained possession) than it does to the matter under consideration here (inasmuch as the appellee's assertion of the fifth amendment is made in a personal, as opposed to a representational, capacity, and is made with respect to documents allegedly in his possesion and control).

[15] Nothing in the above discussion should be taken to cast doubt upon the district court's holding—which we affirm—that those subpoenaed documents in the appellee's possession which are required ei-

C

Rather than identifying specific documents the production of which might prove to be incriminating, the appellee interposed a fifth amendment objection with respect to all of the documents subpoenaed by the grant jury. In *Gould, supra*, we observed that "a blanket citation of the privilege against self-incrimination will not suffice as a valid claim of the privilege." 629 F.2d at 861. The United States contends that the appellee's "blanket" assertion of any fifth amendment rights he might have violates the rule announced in *Gould*.[16]

There are a number of appropriate responses to the Government's position. *Gould* was a civil case, and the authorities cited therein for the above-quoted proposition also were civil cases. *See, e.g., National Life Insurance Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595, 596 (3d Cir. 1980) ("a witness in a *civil* proceeding may not invoke a blanket fifth amendment privilege") (emphasis added). In the criminal context, however, "the proponent of a fifth amendment privilege is required "to move forward only to the limited extent requisite' to show that the privilege is properly claimed." *In re Grand Jury Empanelled (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979) (quoting *In re United States v. Hoffman Can Corp.*, 373 F.2d 622, 628 (3d Cir. 1967)). More important, the Government already has conceded that all of the papers it seeks are potentially incriminating.[17] Additionally, the appellee contends, and

ther to be kept by law or to be disclosed to a public agency should be produced for the grand jury's inspection. *See* Shapiro v. United States, 335 U.S. 1, 33 (1948); *In re* Grand Jury Proceedings (McCoy), 601 F.2d 162, 168-71 (5th Cir. 1979). Indeed, the appellee does not even contest this point.

[16] The record in this case does not contain a written motion to quash by the appellee. We suggest that future appellate review of questions relating to the possible overbreadth of motions to quash would be greatly assisted if such requests were preserved in written form.

[17] *See* Transcript of proceeding (Jan. 12, 1981), Appendix at 29:

THE COURT: Do you also concede that the documents which you seek will or may incriminate [the appellee]?

MR. ULWICK (for the United States): Yes, your Honor.

correctly we believe, that even if he originally did advance a blanket objection, in any event that problem no longer remains, inasmuch as the district court compelled the production of all records required to be kept by law, thereby reducing the contested documents to those business records kept privately by the appellee and alleged by the Government to be incriminating. In sum, it is our view that, in the context of the present dispute, the appellee did not improperly assert his fifth amendment rights.[18]

D

Finally, the United States argues that the district court erred in not compelling the appellee to produce the subpoenaed documents subject to "the functional equivalent of use immunity with respect to the act of production." Under this arrangement, presumably the appellee would turn over the requested records to the Government, which in turn would be obligated not to use the appellee's act of production against him in any way.

We are unpersuaded by the Government's proposition. As the appellee stresses, although the Government, on a number of occasions, suggested to the district court that there were means by which the appellee's act of production could be immunized, no procedure ever was agreed upon and no formal immunization offer under 18 U.S.C. § 6002 or § 6003 was advanced. Given this failure on the part of the Government to identify with particularity the immunity

[18] Although the point may be obvious, we note that this appeal does not involve the question of the appropriate showing required of an individual who invokes the fifth amendment in response to a court order directing the production of documents, thereby risking the possibility of that person's citation for civil contempt. *See, e.g.*, United States v. Rylander, 656 F.2d 1313, 1318-20 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3858 (U.S. Apr. 26, 1982).

proposal it envisioned,[19] we cannot say that the district court erred in rejecting this approach, especially in view of the court's finding that "the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial." Appendix at 98; *see United States v. Garcia*, 544 F.2d 681, 685 n. 4 (3d Cir. 1976).

Because "no party requested the district court to award such immunity," and in view of the Court's traditional reluctance "to intrude into an area which should be more appropriately left to prosecutorial discretion," *see In re Grand Jury Matter*, 673 F.2d 688, 695-96 (3d Cir. 1982) (Sloviter, J., concurring),.we decline to reach the more general question whether an award of use immunity by the Government, designed to override an individual's fifth amendment privilege with respect to potentially incriminating documents in his possession, is permissible under the Constitution.[20]

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[19] Even on this appeal, the United States has described only vaguely the contours of any such immunity arrangement. In its brief, the appellant argues that the possibility.

> the grand jury would draw adverse inferences from [the appellee's] act of production ...*could* be eliminated ... by requring [the appellee] to turn over the documents to the district court, to the prosecutor, a federal agent, *or* his own attorney ... *Alternatively*, the grand jury *could* be instructed by the court or by the prosecutor to draw no inferences from the act of production.

Brief for Appellant at 16-17 (emphasis added).

[20] *See In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1056-59 (1st Cir. 1980) (remanding to allow prosecution opportunity to immunize authentication implicit in the act of production of documents); *see also* Note, *supra* note 9, at 688-92 (commenting favorably on the First Circuit's immunity approach). It could be argued, however, that the immunity arrangement emphasizes only the authentication concern identified in *Fish*, while misprizing the concern that on occasion the act of production itself could constitute a testimonial communication. Justice Marshall elaborated upon this point in his *Fisher* concurrence:

> The Court's theory will also limit the prosecution's ability to use documents secured through a grant of immunity. If authentication that the document produced is the document demanded were the only testimony inherent in production, immunity would be a

III

For the foregoing reasons, the order of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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useful tool for obtaining written evidence ... The Court's recognition that the act of production also involves testimony about the existence and possession of the subpoenaed documents mandates a different result. Under the Court's theory, if the document is to be obtained the immunity grant must extend to the testimony that the document is presently in existence. Such a grant will effectively shield the contents of the document.

Fisher, supra, 425 U.S. at 433-34 (Marshall, J., concurring in the judgment).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1782

IN THE MATTER OF: GRAND JURY EMPANELLED
MARCH 19, 1980
UNITED STATES OF AMERICA, APPELLANT

**SUR PETITION FOR REHEARING
EN BANC**

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*, and VAN ARTSDALEN, *District Judge**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons dissents from the denial.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: Aug. 10, 1982

* Hon. Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Miscellaneous No. 80-53

[Original filed February 4, 1981]

IN THE MATTER OF THE
GRAND JURY EMPANELLED
MARCH 19, 1980

SAROKIN, District Judge

Appearances:

WILLIAM W. ROBERTSON, United States Attorney
By JAMES P. ULWICK, Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102

CHECKI AND POLITAN, ESQS.
Attorneys for [John Doe]
By GLENN T. LEONARD, ESQ.
37 Park Avenue
Lyndhurst, New Jersey

The court has been called upon to determine the extent to which the Fifth Amendment allows the target of a grand jury investigation to resist the production of business records sought by the grand jury by a subpoena *duces tecum*. The issue arises upon the motion of the target [John Doe] to quash five subpoenas directing him to turn over documents and records relating to the operation of several businesses of which he is the sole proprietor. For the reasons stated below, the motion is granted in part and denied in part.

I. *BACKGROUND*

In the fall of 1980, a United States Grand Jury began an investigation into alleged fraudulent activity relating to the submission of bids, bid bonds, and price quotes by various

companies to Hudson County and municipal entities of Hudson County. In addition, the grand jury is delving into the awarding of bids and contracts by Hudson County and the municipalities to these companies, and the alleged diversion of income by these companies to circumvent the Internal Revenue laws. The investigation to date has centered around the involvement of Mr. [Doe] and of his several companies which do business with these municipal entities. Each of the companies involved is a sole proprietorship owned by Mr. [Doe].

On November 19, 1980, the grand jury issued two subpoenas to Mr. [Doe] requiring production of (1) the telephone toll records of several companies of which he is a principal, and (2) "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four accounts held by Mr. [Doe] or his companies.

On November 25, 1980, the grand jury issued a subpoena to Mr. [Doe] calling for production of "any and all records as per the attached Schedule A for [a named company] for the period January 1, 1976 to present." Schedule A lists twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices; payroll records, contracts and copies of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee and workpapers. Another subpoena was issued on December 19, 1980, seeking access to a laundry list of documents relating to [a named company].

Finally, on December 29, 1980, the grand jury directed [Doe] to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of his companies maintained at an off-shore bank.

Mr. [Doe] is resisting production of these documents and has filed the instant application to quash the five subpoenas, relying upon his Fifth Amendment right against self-incrimination.[1]

[1] Mr. [Doe] does not rely upon the Fourth Amendment in resisting the subpoenas. *Cf. United States v. Miller, 425 U.S. 435 (1976) (no legitimate expectation of privacy in bank statements or in negotiable instruments used in commercial transactions).*

II. *DISCUSSION.*

The Fifth Amendment provides that "No person shall be compelled in any criminal case to be a witness against himself." Although the Fifth Amendment does not protect the records of corporations, unincorporated associations or partnerships, a sole proprietor can invoke the privilege to his benefit. *Bellis v. United States*, 417 U.S. 85, 87-88 (1974); *I.C.C. v. Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980); *In Re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 859 (3d Cir. 1979); *United States v. Doe*, 628 F.2d 694, 695 (1st Cir. 1980); *In Re Grand Jury Proceedings*, 601 F.2d 162, 166 (5th Cir. 1979). Because the documents and records pertain to businesses owned by Mr. [Doe] as sole proprietor, the court must determine whether the Fifth Amendment rights of Mr. [Doe] would be infringed by enforcement of the grand jury subpoenas.

The Fifth Amendment is implicated in a claim of privilege relating to the production of business records only when an individual "is compelled to make a testimonial communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). Therefore, before a district court may quash a subpoena directing the production of documents or records, it

> "must be satisfied that three requirements have been met: (1) *compulsion* of a (2) *testimonial communication* that is (3).*incriminating.*

In Re Grand Jury Empanelled (Colucci), 597 F.2d 851, 860 (3d Cir. 1979) (empha is in original). Because the subpoena supplies the compulsion and it is conceded by the government that the material sought is or may be incriminating, the focus in this case is on the second requirement—that there be a testimonial communication.

In so focusing, the relevant inquiry is not whether the subpoenaed documents on their face reveal incriminating communications, but whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher v. United States*, 425 U.S. 391 (1976). In yielding to the command of the subpoena, Mr.[Doe] may be required to make any one of several communications. The mere act of producing the documents may

be considered "a communication of testimonial significance as an admission that the subpoenaed records exist and that they are authentic." *In Re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 861 (3d Cir. 1979); *Andresen v. Maryland*, 427 U.S. 463, 475 (1976) ("the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information."). In addition, the act of production may indicate a belief that the papers produced are those described in the subpoena. *Fisher*, 425 U.S. at 410.

With few exceptions, enforcement of the subpoenas would compel Mr. [Doe] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate Mr. [Doe's] Fifth Amendment rights.

The government insists, however, that it has no need for the testimony of Mr. [Doe] to prove the possession, existence or authenticity of the documents, and that his Fifth Amendment rights are therefore not involved. If the act of production is testimonial, it does not cease to be so because of independent proof of the communications contained therein. Mr. [Doe's] constitutional rights should not rise or fall with the strength of the government's case. Moreover, the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against Mr. [Doe] either before the grand jury or at a subsequent trial, if he is indicted.[2] The government argues that the existence, possession and authenticity of the documents can be proved without Mr. [Doe's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings. Because the court concludes that use of this testimony against Mr. [Doe] for any

[2] The government's position is that although Mr. [Doe's] testimony would not be needed in proving authentication, existence or possession of said documents, the communications nevertheless would be a proper subject of cross-examination at trial, if Mr. [Doe] decided to testify in his own behalf.

purpose would infringe his right against self-incrimination, the motion to quash the subpoena is, for the most part, granted.

There are a number of items requested by the grand jury for which the Fifth Amendment does not offer protection. Records and documents which are required by law to be kept, or to be disclosed to a public agency, are outside the scope of constitutional protection. *In Re Grand Jury Proceedings*, 601 F.2d 162, 168 (5th Cir. 1979). Therefore, insofar as the subpoenas demand the production of documents falling into this category, e.g. tax returns and W-2 statements, Mr. [Doe] must comply. The motion to quash in all other respects is granted.

/s/ H. Lee Sarokin

H. LEE SAROKIN
United States District Judge

Date: February 4, 1981

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Room 730, Federal Building, 970 Broad St., in the city of Newark on the 3rd day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all telephone toll records for [five named companies] for the period January 1, 1977 to present.

This subpoena is issued on application of the United States.

William W. Robertson
United States Attorney

BY: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(201) 645-6556
November 19, 1980

ANGELO W. LOCASCIO
Clerk.

By /s/ JEAN CHERUBINI
Deputy Clerk

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

Dear Witness:

The attached is a subpoena for your appearance before the Federal Grand Jury in Newark, New Jersey, which is investigating alleged violations of Title 18, United States Code, and Title 26, United States Code.

You have been subpoenaed as a witness in the belief that you may have information which will aid the Grand Jury in its investigation. Department of Justice policy requires that all witnesses be advised of the following:

> You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
>
> Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.
>
> If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the Grand Jury room to consult with counsel if you do desire.
>
> If you have any questions, please do not hesitate to contact Michael B. Himmel, AUSA at 645-6556.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Newark, N.J. Federal Building, 970 Broad Street, Rm. 730 in the city of Newark on the 3rd day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present for the accounts listed on the attached Schedule A.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney

BY: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(202) 645-6556
Novemmber 19, 1980.

ANGELO W. LOCASCIO
Clerk.

/s/ JEAN CHERUBINI
Deputy Clerk.

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE A

1. Banco De Santander-Puerto Rico
   Account # [* * * * *]
   Entitled [a named company]
   c/o Mrs. [John Doe] and/or [John Doe] P.O. Box [* * * * *],
   Mayaguez, Puerto Rico 00708
2. Royal Bank of Canada-Puerto Rico
   Account # [* * * * * and * * * * *]
   Entitled [a named company]
   P.O. Box [* * * * *], Mayaguez, Puerto Rico 00708
3. Banco De San Juan-Puerto Rico
   Account # [* * * * *]
   Entitled [a named company],
   [* * * * *], Hato Pey, Puerto Rico 00918
4. Banco De Santander-New York, New York
   Account # [* * * * *]

[Same Warning as on page 29a, *supra*]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Federal Building, 970 Broad St., Room 730 in the city of Newark on the 17th day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all records as per the attached Schedule A for [a named company] for the period January 1, 1976 to present.

This subpoena is issued on application of the United States

WILLIAM W. ROBERTSON,
United States Attorney
By: MICHAEL B. HIMMEL,
Assistant U.S. Attorney
970 Broad St., Newark, NJ
201/645-6556

DATE NOVEMBER 25, 1980

ANGELO W. LOCASCIO
Clerk.
BY JEAN CHERUBINI
Deputy Clerk

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE "A"

1. General ledgers
2. General journals
3. Cash disbursement journals
4. Petty cash books and vouchers
5. Purchase journals
6. Vouchers
7. Paid bills
8. Invoices
9. Cash receipts journal
10. Billings
11. Bank statements
12. Cancelled checks and check stubs
13. Payroll records
14. Contracts and copies of contracts, including all retainer agreements
15. Financial Statements
16. Bank deposit tickets
17. Retained copies of partnership income tax returns
18. Retained copies of payroll tax returns
19. Accounts payable ledger
20. Accounts receivable ledger
21. Telephone company statement of calls and telegrams, and all telephone toll slips.
22. Records of all escrow, trust or fiduciary accounts maintained on behalf of clients
23. Safe deposit box records
24. Records all purchases and sale of all stocks and bonds.
25. A complete list of all partners, associates and employees, together with their home addresses.
26. All W-2 forms of each partner, associate and employee
27. Workpapers.
28. Copies of Tax Returns

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

To [a named company]
Attn: Any authorized Officer or Representative

You are hereby commanded to appear in the United States Court for the District of New Jersey at Federal Building, 970 Broad Street—Rm. 730 in the city of Newark on the 12th day of January 1981 at 10:00 o'clock A.M. to testify before the Grand Jury and being with you[1] any and all books, records and documents as per the attached Schedule A for the period January 1, 1976 to present.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney

By: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(201) 645-6556

ANGELO W. LOCASCIO
Clerk

By /s/JEAN CHERUBINI
Deputy Clerk

Date: DECEMBER 19, 1980

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things in which case the document and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE "A"

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book.
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid Bonds and contracts.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Federal Building, 970 Broad Street—Rm. 730 in the city of Newark on the 7th day of January 1981 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all bank statements and cancelled checks for the period January 1, 1976 to present for the accounts of [two named companies] at the Royal Bank of Canada, Georgetown, Grand Cayman Islands.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney
By: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., New York, N.J. 07102
(201) 645-6556

ANGELO W. LOCASCIO
Clerk
By /s/ JEAN CHERUBINI
Deputy Clerk

Date: DECEMBER 29, 1980

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

[Same warning as on page 32a, *supra*]